Supreme Court, U.S.
FILED

05-219 AUG 11 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

NATIONAL ALTERNATIVE FUELS ASSOCIATION,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and Michael O. Leavitt, Administrator, Environmental Protection Agency,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a person aggrieved by an agency rule can be denied due process and their First Amendment right to petition the court for redress for injuries suffered, for failure to comply with an unwritten rule of the circuit which requires a petitioner to establish their Article III standing in the opening brief, even though the agency being challenged is well aware of the standing of the petitioner and even though the standing of the petitioner is unquestionable.

List of Parties and Corporate Disclosure Statement

Petitioner - NAFA is a not-for-profit association, not a corporation.

Respondent - Environmental Protection Agency

Intervenors - Not shown in the caption are: Alliance of Automobile Manufacturers and Association of International Manufacturers, Inc., who did participate as Intervenors in the case below - despite the fact that their only claim to standing was that they relied upon the rule and they would be injured if the rule was changed - i.e., they claimed a vested interest in maintaining the existing state of the law.

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The Judgment and accompanying Memorandum of the District of Columbia Circuit Court of Appeals was entered February 25, 2005, and a copy of the Judgment and Memorandum is attached as Appendix B.

JURISDICTION

The court of appeals dismissed NAFA'a petition for review of the Final Rule in its Judgment of February 25, 2005 - for *alleged* failure to establish standing. Appendix B. The court of appeals denied the petition for rehearing or rehearing *en banc* on May 13, 2005. Appendix A. This petition follows. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Solicitor General has been provided a copy of this petition as required by Rule 29.4(a), as has the Environmental Protection agency.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

5 U.S.C. § 702 provides:

Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

Petitioner NAFA filed its petition for agency review pursuant to 5 U.S.C. § 702 and FRAP 15(a). The circuit court had jurisdiction and venue was correct to hear this case pursuant to 5 U.S.C. §§ 702-704. Petitioner NAFA's timely petition for review was filed on April 7, 2000, within 60 days of the publication of the final rule, which rule was published in the Federal Register at 65 Fed. Reg. 6698 on February 10, 2000.

This case involves a petition to review the Environmental Protection Agency's 2000 final rule establishing new emission standards ("Tier 2 standards") for passenger cars, light trucks, and larger passenger vehicles - re: **Control of Air Pollution From New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6698 (2000); issued by the** Environmental Protection Agency on February 10, 2000. This final rule imposed new limitations requiring refiners to reduce the amount of sulfur in gasoline nationwide. Petitioner NAFA has challenged the requirements for sulfur reduction as being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts.

In public comments, Petitioner NAFA proposed the use of alternative technologies which EPA arbitrarily declined to consider. This alternative technology would satisfy the emission reduction goals of EPA without the multibillion dollar national sulfur removal required by EPA. American automobile gasoline consumers would reap the financial benefit of much lower gasoline prices on fuels utilizing the alternative technology.

The circuit court dismissed Petitioner NAFA's petition for review, finding that NAFA had failed to establish standing. See Order and Memorandum at 1, Appendix B. Before the court dismissed the case, the court had also denied Petitioner a timely Motion for Extension of Time to submit the Petitioner's Brief, even though Petitioner had shown extraordinary justification - a person who would have provided vital and essential assistance to counsel in preparing

the Petitioner's Brief - Petitioner's expert, Melvin Ingalls - was unavailable to provide assistance within the original briefing schedule. See Appendix E, Order of August 27, 2004. EPA had opposed the extension of time - without claiming any prejudice - and the extension was then arbitrarily denied.

The Petitioner's Reply Brief (which contained further allegations as to standing) was later struck by the court, and not considered, again without any reasoning or explanation from the court. See Appendix C, Order of January 28, 2005.

On September 23, 1999, Petitioner NAFA submitted its comments in response to the Notice of Proposed Rule Making. NAFA commented that it disagreed with EPA's position that sulfur must be reduced in order to achieve proposed Tier 2 NOx requirements. NAFA pointed out that the final rule would have the deleterious effect of significantly reducing coolant aerosols in the atmosphere.

NAFA commented that EPA should consider alternative technology (EPA knew NAFA (through Bill Orr, its Chairman) was associated with research on this technology because EPA was funding the research) which would allow proposed NOx emission standards to be met without the exorbitantly expensive need to remove or reduce sulfur in all gasoline nationwide. NAFA described an additive fuel technology for oxygenated fuels where the additive contained already-approved (under § 211 of the Clean Air Act) ingredients. This additive fuel technology enhanced catalyst activity and prevented phosphorous poisoning of catalysts. The resulting enhanced combustion product would reduce a broad range of emissions, including HC, CO, toxic, N2O, NOx, particulate, and other exhaust emissions. NAFA

showed EPA test results and scientific literature backing up its claims. EPA responded as follows:

COMMENT C: One commenter provided significant comment and attachments related to the use of fuel additives for achieving the desired emission reductions. Specifically, the commenter provided information on the use of oxygenate plus an organic manganese compound. The commenter argues that this approach shows the capability to achieve emission reductions using existing catalytic technology and existing fuel sulfur levels.

Commenter attaches various data and information related to this approach. The commenter recommends that EPA delay the Tier 2 rulemaking until complete tests can be conducted to determine the viability of this approach. The commenter also notes that the approach would be far less costly because the refinery modifications would not be required and the existing catalytic technology could continue to be used.

RESPONSE: We did not propose alternate means to getting the emissions reductions we identified in our proposal because of the clear connection we made between gasoline sulfur levels and catalyst performance. Our purpose in controlling gasoline sulfur is to enable and ensure the overall emissions performance of Tier 2 vehicles, not simply to get NOX emissions. We do not believe that the recommended approach would get the same emissions benefits as gasoline sulfur control because it would still allow the emissions performance of Tier 2 catalysts to be degraded by exposure to unreasonably high sulfur levels and because we are uncertain about

> the actual emissions reductions which would occur through the use of such an organic manganese compound.
>
> We will evaluate any data as it becomes available, but do not expect that any changes to the gasoline sulfur program would result from information provided about gasoline additives.
> **Response to [public] Comments at 32-2.**

Had EPA not cursorily dismissed NAFA and actually evaluated NAFA's data and proposed fuel additive, it would have determined that NAFA's alternative was an acceptable and reasonable alternative that would achieve desired emission reductions, a substantial amount of the U.S. gasoline pool could have been treated with the additive, thus eliminating the need to modify some refineries, change some fuel distribution systems, or create an unproven combustion system.[1]

But EPA did know that NAFA had "standing" to challenge the rule. Their argument in the Respondent's brief that NAFA had failed to establish standing was opportunistic, to say the least.

The finding of a necessity for sulfur reduction in fuels was based in large part on EPA's conclusion that sulfur caused serious and permanent damage to catalysts, preventing them from working properly to reduce various emissions. EPA's conclusions were included in the Notice of Proposed Rulemaking, in their April 1999-dated Appendix B. Doc. III-B-01. When EPA promulgated the final rule, it issued a new,

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[1] Tier 2 vehicles, those which would comply with the final rule, did not yet exist when the final rule was adopted.

December 1999-dated Appendix B, which abandoned the data on which it had relied in the proposed rulemaking. Doc. V-B-01.

The December 1999 Appendix B and its supporting data were not published with the Notice of Proposed Rulemaking in 1999, thus there was never any opportunity for public comment on the Appendix B that was relied on as justification for the Final Rule. EPA hid the relevant "science" from the public until after the rule was issued, and what they hid is the problem that cannot be addressed by a reviewing court, which is not in position to conduct an evidentiary hearing and to analyze the shortcomings of the EPA supporting "science".

NAFA argued in its Petitioner's Brief that "*EPA ignored that NAFA stated its recommended fuel additive would reduce a broad range of emissions* - including HC, CO, toxic, N2), NOX, particulate and other exhaust emissions. Despite this and other evidence of standing (and EPA's substantial knowledge, which was established in other court pleadings but ignored by the circuit court), the circuit court found NAFA had failed to establish its standing - even though it had argued its fuel additive was prohibited by the rule!

A national rule was justified by EPA, as opposed to regional rules, in large part because EPA theorized that sulfur "damage" would be irreversible and that cars driven anywhere or at any time on high sulfur fuels would have their emission systems permanently compromised. But, as EPA admitted, some areas of the country have less "need" for emissions reductions than others. 65 Fed.Reg. at 6756- 6757 (which was a justification for "phasing in" sulfur reduction compliance, which resulted in geographic phase-in areas ("GPA's")). If sulfur "damage" was reversible, areas of the country not needing major emissions reductions or already

typically receiving low sulfur fuels would not have needed the rule and refiners could have produced much more limited quantities of low sulfur fuels. A national rule was many times more expensive than a regional or seasonal rule would have been. NAFA's recommended fuel additive for oxygenated fuels would also have substantially reduced the need for low sulfur fuels - and it would have eliminated the need for a national rule affecting all gasolines.

REASONS FOR ALLOWING THE WRIT

I. The court of appeals arbitrarily denied Petitioner NAFA due process and its First Amendment right to petition the court for redress for injuries suffered, for NAFA's "failure" to comply with an unwritten rule of the circuit which requires a petitioner to establish their Article III standing in the opening brief, even though the agency being challenged was well aware of the standing of the petitioner and even though the standing of the petitioner should be unquestionable.

There is a presumption that parties aggrieved by final agency actions have a right to judicial review. See 5 U.S.C. § 702. The circuit court's arbitrary dismissal of the Petition for Review, for Petitioner's failure to comply with a "reminder" of a preferred briefing practice provided in a briefing scheduling order,[2] violates the presumption of judicial review[3] and places idiosyncratic court preferences above the rights of the Petitioner. Judicial review of government action

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[2] *See* Appendix F.

[3] *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

has long been recognized as inherent in our constitutional structure:

> "'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'"

United States v. Nourse, 9 Peters 8, 28-29 (1835)

It would be ironic if the presumption of judicial review was to be overcome by arbitrary court practices. The unwritten rule of the circuit also contradicts a long-established rule of this Court: "the necessary factual predicate [to establish standing] may not be gleaned from the briefs and arguments themselves." *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883). The circuit court has no rule which sets out how parties to agency review proceedings should establish standing. The federal appellate rules also establish no procedure to prove standing on appeal.

Procedures for establishing standing on review of an agency decision should be fair and clearly established and must be different than procedures in the trial court:

> At the district court stage, the facts required to demonstrate standing should normally appear on the face of the complaint. At the appellate stage, however,

> the "complaining party" does not allege any facts but merely identifies himself as a party to the case in the district court [or rulemaking] and challenges the validity of that decision. ***Only if the appellant's standing is challenged must he allege facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal.***

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 551-552) (1986) Warren, C.J. *dissenting* (emphasis added). When standing becomes an issue on appeal, there is no substitute for allowing a party his due process right to respond with allegations of "facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal." *See Id.*

When EPA in its Respondent's Brief challenged Petitioner NAFA's standing, NAFA should have been allowed to submit affidavits demonstrating its standing. They did so with their Reply Brief, which was struck by the court and would not have been considered, anyway. There was no requirement for establishing Article III standing when submitting comments to the agency during rulemaking, since that is not an Article III body. The circuit court should adopt a formal requirement - *i.e.*, a Circuit Rule -for a procedure to establish standing on appellate review of agency decisions where - as in this case - there was no district court proceeding. Disqualifying NAFA for failure to comply with a court reminder - while allowing no opportunity to remedy the "failure" - is a total denial of due process and a denial of meaningful access to the courts. The latter is a denial of NAFA's First Amendment right to petition the government.

DENIAL OF RIGHT TO PETITION

The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967). "The right of access to the courts is . . . but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right to petition is not a qualified right, to be strictly construed, but a fundamental right to be liberally interpreted and strongly protected: The intent of the framers of the First Amendment was to create a *broader system of rights* than that enjoyed by British subjects: "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges v. California*, 314 U.S. 252, 265 (1941).

The circuit court dismissed Petitioner NAFA's appeal, finding that NAFA failed to establish standing. But before the Appeal was dismissed, the panel also unreasonably and without explanation:

1. Refused to allow NAFA a short extension of time in which to submit its Petitioner's Brief, despite no claim of prejudice from EPA and despite extraordinarily compelling justification being shown for NAFA's need for an extension of time. Appendix E.

2. Refused to allow NAFA leave to file an amended opening brief and ordered the lodged First Amended Brief be returned, despite no prejudice being claimed by EPA and despite extraordinarily compelling justification having been shown for NAFA's need for the amended brief. Appendix D.

As a result, the Petitioner's Brief did not contain what it should and would have, including more substantial allegations of allegations of standing and arguments about many important issues which counsel could not address without assistance from his client and from his client's retained expert, which assistance was not available before the initial due date for Petitioner's Brief.

Petitioner NAFA never had a venue or a reasonable opportunity in which to submit evidence of its standing. Neither the agency or the circuit court ever held an evidentiary proceeding to allow NAFA to present evidence of its standing. EPA challenged Petitioner NAFA's standing in its Respondent's Brief, when the Agency knew full well that NAFA had standing.

A "reminder" note from the clerk (See Appendix F - reminder buried in a notice of briefing and argument schedule) that standing ***should be addressed*** [***not must be addressed***] in the Opening Brief is not sufficient notice to the Petitioner as to how standing should be addressed in a case such as this, where Petitioner NAFA challenged the EPA's promulgation of a national rule mandating certain fuel standards, namely, the drastic reduction in the sulfur content of automotive fuels.

Petitioner NAFA followed the rules for briefing as they are laid out in the federal appellate rules, namely FRAP 28. Petitioner NAFA also followed the local rules for briefing in the circuit, namely Circuit Rule 28. Neither one of those rules indicates that facts as to standing must or even should be asserted and established in the opening brief of the Petitioner.

Petitioner NAFA has raised issues of great public importance in its petition challenging the final rule. The final

rule has imposed tens of billions of dollars of unjustified and unnecessary costs on the American public, contributing to today's dramatic increases in gasoline prices. The final rule has caused significant adverse health consequences to the public, and the agency was told and understood that these adverse health consequences would result before the rule was adopted.

EPA knew from discussions with NAFA that NAFA sought an exemption from the Final Rule that would save fuel suppliers and gasoline consumers untold hundreds of millions (or billions) of dollars. EPA knows these things because they were told by NAFA during settlement discussions. The standing of NAFA could (and was with the stricken Reply Brief) be further established through affidavits or testimony from NAFA and its members. The EPA knew of NAFA's proposed fuel additive because they were funding Bill Orr's research on it during the briefing below and they knew that NAFA believed this fuel additive would reduce ozone absent the high costs associated with EPA's mandated fuel sulfur reductions.

Yet, EPA argued the petition for review should be dismissed because NAFA failed to establish its standing. The circuit court obliged.

NAFA respectfully requests that the matter be remanded and the appeal be reopened, that NAFA be allowed to submit its evidence of standing, and that the issues be rebriefed from the beginning, starting with the Petitioner's Brief.

In order for an association to have Article III representational standing, at least one of its members must have standing to bring the petition in his or her own right, the interests the association seeks to protect must be germane to

its purpose, and the claim asserted and the relief sought must not require the individual member or members to participate directly in the suit. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

On reopening this appeal, NAFA can show: (1) NAFA's members are gasoline consumers and are adversely affected by the higher automotive gasoline prices resulting from a national rule which was unnecessary. As such, they have standing. *See U.S. v. SCRAP*, 412 U.S. 669, 690 (1973) (an identifiable injury, even if it is only a trifling financial cost which the litigant shares with many others across the nation, is sufficient to confer standing); (2) that Bill Orr, a member of NAFA, has property interests (patents) involving the fuel additives whose commercial value will be destroyed by the national rule; and that NAFA's members, including Bill Orr, will suffer adverse health consequences from the increased ozone problems resulting from the final rule. All of these interests are sufficient to establish standing. NAFA can also show that the rule should be invalidated or the matter should be remanded for further rulemaking.

In this instance, NAFA considered its standing self-evident and it believed the EPA could have no doubt as to NAFA's standing. In part, this was based on comments during rulemaking and on previous settlement discussions with the agency, discussions in which NAFA asked for an exemption from the Tier 2 low sulfur requirements imposed by the Final Rule for a proprietary oxygenated gasoline that could enable Tier 2 vehicles to meet Tier 2 emission standards without using low sulfur fuels.

ARBITRARY DENIAL OF DUE PROCESS

The circuit court arbitrarily refused to allow Petitioner NAFA to make a supplemental showing as to its standing. Where petitioners make a supplemental but irrefutable showing of standing, and their supplemental declarations "make it patently obvious that at least one of their members will suffer a cognizable "injury in fact" as a result of the disputed order," supplemental declarations should be considered. *See Communities Against Runway Expansion, Inc. v. Federal Aviation Administration,* 355 F.3d 678 (D.C. Cir.2004). Where the conclusion of standing established in supplemental declarations is irrefutable, the Respondent will not be prejudiced by its inability to respond to the supplemental declarations. *Id.* EPA could claim neither prejudice or surprise, since it was well aware of NAFA's (and its members') interests.

Standing to sue or defend in a case in federal court (in the trial court or on appeal) is an aspect of the case or controversy requirement of Article III. *See Arizonans for Official English v. Arizona* 520 U.S. 43, 64 (1997). Standing may be evaluated at any stage of a proceeding, including on appeal. *See Id.*, at 65. The standing required by a person seeking appellate review is the same as a person initiating a case in the district court, but *the procedures for establishing standing on appeal must be different. See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 551-552) (1986) Warren, C.J. *dissenting.*

When standing becomes an issue on appeal, there is no substitute for allowing a party to respond with allegations of "facts sufficient to convince the court of appeals that he is a proper party to pursue the appeal."

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of [such] mere technicalities." *See Foman v. Davis*, 371 U.S. 178, 181 (1962). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* (Internal quotation omitted). There is no reason to apply any different logic to requirements for *pleading standing* in an appellate court.

The anticipated injuries to NAFA's members are fairly traceable to the EPA Final Rule, and these injuries would be redressed by a decision setting aside that rule or remanding the matter to the agency for further proceedings. NAFA, therefore, has standing to challenge the Final Rule. NAFA should, for similar reasons, have been allowed its requested extension of time to submit its Petitioner's Brief, or it should have been allowed to submit its Amended Petitioner's Brief: "The grant or denial of [an extension of time or] an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.* The panel denied an extension of time and denied leave to amend without any justifying reason being offered.

CONCLUSION

The right to petition for redress of grievances is too important a right to be denied simply because a party failed to observe an unwritten rule for establishing standing on appeal. Mere convenience of the courts cannot become more

important than maintaining respect for the rights of the parties. For all the reasons provided above, the writ should be granted.

Dated this 11th day of August, 2005.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

[Filed May 13, 2005]

No. 00-1147

National Alternative Fuels Association, Petitioner	)
v.	)
Environmental Protection Agency and Michael O. Leavitt. Administrator, Environmental Protection Agency, Respondents	)
Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers, Inc., Intervenors.	)

BEFORE: Edwards, Sentelle, and Roberts, Circuit Judges.

ORDER

Upon consideration of petitioner's petition for rehearing, it is ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By: /s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

[Filed February 25, 2005]

No. 00-1147

National Alternative Fuels Association, Petitioner	)
v.	)
Environmental Protection Agency and Michael O. Leavitt. Administrator, Environmental Protection Agency, Respondents	)
Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers, Inc., Intervenors.	)

On Petition for Review of an Order
of the Environmental Protection Agency

Before: EDWARDS; SENTELLE,
and ROBERTS, *Circuit Judges*

JUDGMENT

This cause was considered on a petition for review of an order of the Environmental Protection Agency and was briefed by counsel. It is

ORDERED AND ADJUDGED that the petition for review is hereby dismissed for the reasons set forth in the, accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*, See Fed, R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By:/s/_____
Michael C. McGrail
Deputy Clerk

MEMORANDUM

National Alternative Fuels Association ("NAFA") petitions for review of a final rule of the Environmental Protection Agency ("EPA") establishing vehicle emissions standards and fuel controls. See Control of Air Pollution from new Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6698 (Feb. 10, 2000). Because NAFA has failed to establish its standing to pursue the petition for review, we dismiss the petition for want of jurisdiction.

In Sierra Club v. EPA, 292 F:3d 895 (D.C, Cir. 2002), we held:

[A] petitioner whose standing is not self[-]evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief- and not ... in reply to the brief of the respondent agency.

Id. at 900. We reminded the parties of this requirement in our order establishing the briefing schedule for this case. *See Nat'l Alternative Fuels Ass'n v. EPA;* No. 00-1147 (D.C. Cir. July 9, 2004).

NAFA's standing is far from self-evident. In its brief, NAFA describes itself as a group of scientists and concemed individuals "who are committed to clean and efficient combustion fuels," and whose mission is, *inter alia,* "to focus intellectually honest scientific attention to the dynamics of our environment." Final Petitioner's Brief at 4. NAFA similarly

identified itself in its comments to EPA during the rulemaking process. *See* Joint Appendix at 865.

Under *Sierra Club*, NAFA was therefore required to establish its standing in its opening brief, identifying evidence either in the record or in affidavits or other evidence appended to its brief. NAFA failed to carry this burden, proffering no argument or evidence whatsoever relating to its standing in its opening brief. NAFA loosely, vaguely, and unimpressively attempted to cure this deficiency in its reply brief. We granted respondent's motion to strike that brief, however, because NAFA improperly attempted to raise standing arguments for the first time in its reply brief, impermissibly raised new arguments on the merits challenging the agency's rule, and inappropriately offered extra-record evidence in support of its petition. *See Nat'l Alternative Fuels Ass'n v. EPA*, No. 00-1147 (D.C. Cir. Jan. 28, 2005), reconsideration denied, *Nat'l Alternative Fuels Ass'n v. EPA*, No. 00-1147 (D.C. Cir. Feb. 10, 2005). Accordingly, NAFA now appears to acknowledge that it has failed to carry its burden on standing. *See* Petitioner's Motion To Reconsider Order To Strike Reply Brief at 2 ("If the Reply Brief is disallowed, EPA wins this case by default."); *id.* at 6 ("Striking the Reply Brief leaves Petitioner unable to address standing.")

Because "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), NAFA's failure to carry its burden of establishing standing deprives us of jurisdiction over this petition for review. We accordingly dismiss the petition.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

[Filed January 28, 2005]

No. 00-1147

National Alternative Fuels Association, Petitioner	)
v.	)
Environmental Protection Agency and Michael O. Leavitt. Administrator, Environmental Protection Agency, Respondents	)
Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers, Inc., Intervenors.	)

BEFORE: Edwards, Sentelle, and Roberts, Circuit Judges.

ORDER

Upon consideration of the Environmental Protection Agency's motion to strike petitioner's reply brief, the response and the opposition thereto, it is ORDERED that the motion be granted.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By:/s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2004

[Filed October 7, 2004]

No. 00-1147

National Alternative Fuels Association,
Petitioner

v.

Environmental Protection Agency and
Michael O. Leavitt. Administrator,
Environmental Protection Agency,
Respondents

Alliance of Automobile Manufacturers
and Association of International
Automobile Manufacturers, Inc.,
Intervenors.

BEFORE: Sentelle and Roberts, Circuit Judges, and Williams, Senior Circuit Judge.

ORDER

Upon consideration of petitioner's motion to reconsider denial of request for extension of time to file petitioner's brief, and the lodged first amended brief, it is

ORDERED that the motion be denied. The Clerk is directed to return to petitioner the first amended brief.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By:/s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2003

[Filed August 27, 2004]

No. 00-1147

National Alternative Fuels Association,
Petitioner

v.

Environmental Protection Agency and
Michael O. Leavitt. Administrator,
Environmental Protection Agency,
Respondents

Alliance of Automobile Manufacturers
and Association of International
Automobile Manufacturers, Inc.,
Intervenors.

Before: Sentelle and Roberts, Circuit Judges
and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's motion for extension of time to file brief, and the opposition thereto, it is

ORDERED that the motion be denied. It is

FURTHER ORDERED that the following revised schedule will now apply:

Petitioner's Brief	September 3, 2004
Respondents' Brief	November 2, 2004
Intervenors' Brief	November 17, 2004
Petitioner's Reply Brief	December 1, 2004
Deferred Appendix	December 8, 2004
Final Brief	December 22, 2004
Oral Argument	February 14, 2004

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

By:/s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2003

[Filed July 9, 2004]

No. 00-1147

National Alternative Fuels Association, Petitioner	)
v.	)
Environmental Protection Agency and Christine Todd Whitman. Administrator, Environmental Protection Agency, Respondents	)

ORDER

Upon consideration of respondents' motion regarding the briefing schedule, it is

ORDERED that the motion be granted.

This case has been scheduled for oral argument on Monday, February 14, 2005 at 9:30 AM before Circuit Judges Sentelle and Roberts and Senior Judge Williams. The

time and date of oral argument will not change absent further order of the Court.

It is ORDERED, on the court's own motion, that a briefing schedule be established as follows:

Petitioner's Brief	Fri, Aug 27, 2004
Respondent's Brief	Tue, Oct 26, 2004
Intervenor for Respondent's Brief	Wed, Nov 10, 2004
Petitioner's Reply Brief	Wed, Nov 24, 2004
Deferred Appendix	Thu, Dec 2, 2004
Final Briefs	Thu, Dec 16, 2004
Oral Argument	Mon, Feb 14, 2005

Because the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons.

Parties are strongly encouraged to hand deliver their briefs to the clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must utilize the most expeditious form of delivery. *See* Fed.R.App.Proc 25(a). Briefs should be in final form. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. *See* D.C.Cir.Rule 28(a)(7).

A further order of the Court will be issued regarding the allocation of time for argument.

Petitioner must raise issues and arguments in the opening brief. The Court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

The court reminds the parties that "a petitioner whose standing is not self-evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief and not... in reply to the brief of the respondent agency. In either procedural context the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim. In its opening brief, the petitioner should also include in the 'Jurisdictional Statement' a concise recitation of the basis upon which it claims standing." *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C.Cir. 2002).

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/_____
Cheri Carter
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 14 2005
OFFICE OF THE CLERK

No. 05-219

In the Supreme Court of the United States

NATIONAL ALTERNATIVE FUELS ASSOCIATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed a petition for review of a rule promulgated by the Environmental Protection Agency when the petitioner failed to establish its Article III standing in accordance with the procedure established by court of appeals precedent and explicitly set forth in the court's scheduling order.

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In the Supreme Court of the United States

No. 05-219

NATIONAL ALTERNATIVE FUELS ASSOCIATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The memorandum and judgment of the court of appeals (Pet. App. 3a-6a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on February 25, 2005. A petition for rehearing was denied on May 13, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on August 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2000, the National Alternative Fuels Association (NAFA) and others filed petitions for review pursuant to 42 U.S.C. 7607(b)(1) with the United States Court of Appeals for the District of Columbia Circuit regarding various provisions of a rule promulgated by the Environmental Protection Agency (EPA) pursuant to 42 U.S.C. 7521 and 7545, which established limits on the sulfur content of gasoline.[1] See *Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements*, 65 Fed. Reg. 6698 (2000). The petitions were consolidated and stayed during settlement negotiations.

By November 2003, all claims were settled and dismissed except for those pursued by NAFA. The court of appeals lifted the stay on the NAFA claims in November 2003, and issued a scheduling order on July 9, 2004, which required that petitioner file its merits brief by August 27, 2004. Pet. App. 13a-15a. The court scheduled the case for argument on February 14, 2005, and provided that "[b]ecause the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons." *Id.* at 14a. The court of appeals also included in the text of its order the following provision:

> The court reminds the parties that "a petitioner whose standing is not self-evident should establish its standing by the submission of its arguments and

[1] In its petition, NAFA presents substantive arguments about the rule. Pet. 4-8. The government disputes the petition's factual and legal assertions, but does not address them because the merits of the claim are not before this Court.

> any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceedings. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief and not . . . in reply to the brief of the respondent agency. In either procedural context the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim. In its opening brief, the petitioner should also include in the 'Jurisdictional Statement' a concise recitation of the basis upon which it claims standing." *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

Id. at 15a.

On August 14, 2004, NAFA sought a five-week extension of its briefing deadline to allow its counsel more time for "assistance from his client and from his client's retained expert." Pet. 12. The court granted a one-week extension, making petitioner's brief due September 3, 2004. Pet. App. 11a-12a.

NAFA filed its brief on September 3, 2004, describing itself as "a group of scientists and concerned individuals 'who are committed to clean and efficient combustion fuels,'" and who seek "to focus intellectually honest scientific attention to the dynamics of our environment," Pet. App. 5a (quoting Final Pet. Br. at 4). NAFA had similarly characterized itself in public comments submit-

ted to EPA that were part of the administrative record for the disputed rule. *Id.* at 5a-6a.[2]

NAFA filed a motion to file an amended brief, but the motion, and a subsequent motion for reconsideration, were denied. Pet. App. 9a-10a. The government filed its brief on November 2, 2004, and asserted, inter alia, that NAFA had failed to establish standing in accordance with court procedure. Pet. 10. NAFA filed a reply brief, but it was stricken after briefing on a motion by the government to strike "because NAFA improperly attempted to raise standing arguments for the first time in its reply brief, impermissibly raised new arguments on the merits challenging the agency's rule, and inappropriately offered extra-record evidence in support of its petition." Pet. App. 6a; see *id.* at 7a-8a. NAFA's subsequent motion for reconsideration was denied. *Id.* at 9a-10a.

On February 25, 2005, the court of appeals issued its memorandum and judgment dismissing NAFA's petition for review. Pet. App. 3a-6a. The court explained that the petition was dismissed "for want of jurisdiction" because "NAFA has failed to establish its standing to pursue the petition for review" as required by circuit court precedent. *Id.* at 5a. The court of appeals found that petitioner's standing was "far from self-evident," and that it "proffer[ed] no argument or evidence whatsoever relating to its standing in its opening brief," and then attempted to "loosely, vaguely, and unimpressively * * * cure this deficiency in its reply brief." *Ibid.*

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[2] The government disputes the allegations made by NAFA regarding extra-record settlement discussions (Pet. 13), but does not address the allegations in this response because they were not properly before the court of appeals, and are not relevant to the issue before this Court regarding the sufficiency of NAFA's standing allegations.

Petitioner filed motions for panel rehearing and rehearing en banc, which were denied on May 13, 2005. Pet. App. 1a-2a.

ARGUMENT

The court of appeals correctly ruled, based on the standing allegations in petitioner's opening brief below, that petitioner and its individual members do not have Article III standing to challenge EPA's rule. The court of appeals also correctly struck petitioner's reply briefs, which "loosely, vaguely, and unimpressively" failed to demonstrate Article III standing, and which violated the D.C. Circuit's local rules, its briefing order in this case, and established precedent. See Pet. App. 6a. Those rulings are correct, and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 12) that the court of appeals improperly dismissed its petition because petitioner was not given sufficient notice of the court's procedure by the inclusion of a "'reminder' note from the clerk * * * buried in a notice of briefing and argument schedule." That argument is incorrect, and does not merit review by this Court.

Petitioner received ample notice of the court's required procedure. The so-called "reminder note" was set forth in the text of the court's scheduling order, contained a citation to the court's decision in *Sierra Club* v. *EPA*, 292 F.3d 895 (D.C. Cir. 2002), and included a word-for-word quotation from that case detailing the standard procedure to be followed by a petitioner seeking review of an agency decision. See Pet. App. 15a; see also Pet. App. 5a.

In *Sierra Club*, the court of appeals determined that a standard procedure for establishing standing was warranted because standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," meaning that the absence of standing deprives a federal court of jurisdiction to hear the case. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In contrast to cases that originate in the district court, petitions for review of agency actions originate in an administrative forum that is "not subject to Article III of the Constitution of the United States." *Sierra Club*, 292 F.3d at 899 (quoting *Pfizer Inc.* v. *Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). Therefore, even though "the petitioner ordinarily will have participated in the proceedings before the agency," the parties were not required to establish Article III standing at that stage of the proceeding, meaning that it is not until the petitioner seeks judicial review in the court of appeals that "the constitutional requirement that it have standing kicks in, * * * the same, of course, as it would * * * if such review were conducted in the first instance by the district court." *Ibid.*

The party that "invok[es] federal jurisdiction bears the burden of establishing" its standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. When a party seeks review of agency action before the court of appeals, it is "asking the court of appeals for a final judgment on the merits," so "it must support each element of its claim to standing 'by affidavit or other evidence'" sufficient to justify a judgment on the merits. *Sierra Club*, 292 F.3d at 899 (quoting *Lujan*, 504 U.S. at 561).

Accordingly, the court of appeals established a "fair and orderly process" that would provide "arguments for and against standing"—"the same tried and true adversarial procedure we use for the presentation of arguments on the merits." *Sierra Club*, 292 F.3d at 900-901. As quoted in the scheduling order in this case, the court in *Sierra Club* announced the following procedure to be utilized in all future cases:

> Henceforth, therefore, a petitioner whose standing is not selfevident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief—and not, as in this case, in reply to the brief of the respondent agency. In either procedural context the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim. In its opening brief, the petitioner should also include in the "Jurisdictional Statement" a concise recitation of the basis upon which it claims standing.

Ibid.

Petitioner was thus provided ample notice of its obligation to establish its standing and the appropriate mechanism for doing so. Petitioner's claim that it did not receive adequate notice is therefore without merit. And, in any event, petitioner points to nothing that

would justify this Court's review of this factbound question.

2. Petitioner also contends (Pet. 15-16) that it was an "arbitrary denial of due process" to "refuse[] to allow Petitioner NAFA to make a supplemental showing as to its standing" because the "Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." Pet. 16 (quoting *Foman* v. *Davis*, 371 U.S. 178, 181-182 (1962) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957))). That argument is without merit.

Petitioner did not make just one "misstep." Instead, petitioner failed to demonstrate a jurisdictional prerequisite in accordance with the procedures clearly established by the court. Petitioner's attempt to remedy that default by supplying new arguments and extra-record evidence in its reply brief was a further violation of the D.C. Circuit's rules, which prohibit the submission of new arguments and extra-record material in a reply brief. Pet. App. 6a; see *Coalition for Noncommercial Media* v. *FCC*, 249 F.3d 1005, 1010 (D.C. Cir. 2001) (reply brief, "as we have said many times, is too late for a new argument"). Petitioner offers no plausible basis for excusing its defaults, and the D.C. Circuit's factbound refusal to do so does not merit this Court's review.

3. Petitioner also errs in contending (Pet. 8-14) that the court of appeals violated petitioner's First Amendment right to petition the court for redress of grievances by dismissing its petition based on "idiosyncratic court preferences." The First Amendment does not confer on litigants who fail to establish Article III standing any right to federal court review of the merits of their claims. Here, petitioner did not establish its standing to

maintain the suit, and the court of appeals properly dismissed the case for lack of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2005